STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Before: Judges Talbot, P.J., and Griffin and Wilder, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

RAYMOND A. MCCULLER, **Docket No. 128162**

Defendant-Appellant.
_____/

Court of Appeals No. 25000

Oakland County Circuit Court No. 02-183044-FH

128161

BRIEF ON APPEAL OF CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT

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THIS APPEAL INVOLVES A RULING THAT A PROVISION OF A STATUTE IS INVALID

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STATEMENT OF QUESTIONS PRESENTED

Do judicial findings of fact, that increase a defendant's statutory maximum sentence from an intermediate sanction to a prison sentence, violate the Sixth Amendment?

Amicus Answers: Yes.

Trial court answered: No.

Court of Appeals answered: No.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus curiae Criminal Defense Attorneys of Michigan, relies on the Statement of Facts of Defendant-Appellant, McCuller, whom amicus supports.

ARGUMENT

I. BLAKELY APPLIES TO THE INTERMEDIATE SANCTIONS CELL OF MICHIGAN'S SENTENCING GUIDELINES

Judicial findings of fact that increase a defendant's statutory punishment from an intermediate sanction to a prison sentence violate a defendant's jury trial right. The factual findings by the trial court in this case, using a lesser standard than beyond a reasonable doubt, increased Mr. McCuller's statutory maximum sentence and, therefore, violate the Sixth Amendment. *See Blakely v. Washington*, 542 US 296, 124 SCt 2531 (2004).

In *Blakely*, the Court held that any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *See id.* at 301 (internal quotations omitted). This holding re-affirmed the Court's earlier statement of this rule in *Apprendi v. Washington*, 530 US 466, 490; 120 SCt 2348 (2000). *Blakely*, 542 US at 301. In Blakely's case, the Washington state statutory guidelines – without the impermissible fact-finding -- provided for a maximum sentence of 49 to 53 months. *See id.* at 299. The trial court's findings of fact, that the defendant had acted with "deliberate cruelty," resulted in the defendant receiving a sentence of 90 months. *See id.* at 300. It was this judicial fact-finding and imposition of a sentence greater than that permitted by the jury's verdict that violated the Sixth Amendment. *See id.* at 304. The *Blakely* Court rejected Washington State's argument that, regardless of the statutory guidelines, the trial court could constitutionally find facts that increased a defendant's sentence, as long as the court stayed below the absolute maximum sentence for the offense. *Id.* at 303. Instead, the Court defined statutory maximum as "the maximum sentence a judge may impose

solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 300 (emphasis in original).

United States v. Booker, 543 US 220, 125 SCt 738 (2005), which applied *Blakely* to the U.S. Sentencing Guidelines, reaffirmed that judges may only impose sentences that are permitted by the jury's factfinding or by the defendant's admission. *See Booker*, 125 SCt at 749. Both *Blakely* and *Booker* emphasized the structural and historic importance of jury determinations of facts that subject a defendant to additional criminal punishment. *See, e.g., Blakely*, 542 US at 305-308. The Court explained that this rule was necessary to give adequate protection to the longstanding and fundamental right to jury trial. *Blakely*, 542 US at 305-06; *Booker*, 125 SCt at 752. Amicus discussed more fully, in its brief in *People v. Drohan*, Docket No. 127489, both the constitutional jury right that forms the backbone of the U.S. Supreme Court's line of decisions and the application of *Blakely* to the Michigan legislative guidelines generally. *See Brief on Appeal of Criminal Defense Attorneys of Michigan as Amicus Curiae in Support of Defendant Appellant* (Available from counsel). As requested by this Court in its November 28, 2005 order, in this brief, Amicus focuses specifically on the application of *Blakely* to "intermediate sanction" sentences.

A. JUDICIAL FACT FINDING THAT INCREASES THE STATUTORY MAXIMUM FROM AN INTERMEDIATE SANCTION IS A CLEAR VIOLATION OF BLAKELY

Blakely applies to judicial findings of fact that increase a defendant's sentence from the statutory maximum intermediate sanction to a prison sentence.

The Michigan legislative guideline's intermediate sanctions provision establishes a defendant's statutory right to a fixed, determinate sentence. "Intermediate

sanction" is defined as "probation or any sanction, other than imprisonment in a state prison or reformatory, that may lawfully be imposed." MCL 769.31(b). An intermediate sanction may include a jail term, but the term cannot be longer than the upper limit of the recommended sentencing range or 12 months, whichever is less. MCL 769.34(4)(a).[1] This creates a statutory maximum sentence of, at most, 12 months. These jail sentences are fixed, determinate sentences. *People v Martin*, 257 Mich App 457; 668 NW2d 397 (2003).

Trial courts must impose these intermediate sanctions, and the attendant statutory maximum sentences, when called for by the guidelines. The trial court *shall* impose an intermediate sanction unless the court finds, on the record, a substantial and compelling reason to impose a higher sentence. MCL 769.34(4)(a). The trial court is required to sentence a defendant, who falls in an intermediate sanction cell to a sentence of, at most, 12 months. Defendants are entitled to receive an intermediate sanction if the highest recommended minimum sentence provided by the legislative guidelines is 18 months or less. MCL 769.34(4)(a). When a defendant's minimum guideline sentence is above 12 months, but 18 months or less, the defendant must still receive an intermediate sanction. *Id.* For example, even if a defendant's minimum guideline sentence is 16 months, he is entitled to a statutory maximum of 12 months in jail. *See People v. Stauffer*, 465 Mich. 633, 636; 640 NW2d 869 (2002); *People v. Babcock*, 469 Mich. 247, 256 n. 9; 666 NW2d 231 (2003).

[1] This sentence, of 12 months or less, will necessarily mean that an intermediate sanction sentence will not be a prison sentence to a Department of Corrections facility. *See People v Blythe*, 417 Mich 430, 436-37; 339 NW2d 399 (1983); MCL 769.28.

If the trial court finds additional facts that, as in Mr. McCuller's case, move him from an intermediate sanction cell to a guideline cell that allows for a prison sentence, this fact-finding subjects the defendant to a higher maximum than he was entitled to based on the jury verdict alone. *Blakely*, 542 US at 303-04.

In Mr. McCuller's case, the jury found him guilty of assault with intent to do great bodily harm less than murder, MCL 750.84. *People v. Raymond A. McCuller*, Mich. App., unpublished per curiam opinion (No. 250000, Jan. 11, 2005). Based on his prior criminal convictions, Mr. McCuller received points for Prior Record Variable 2 and Prior Record Variable 5. *See Blakely*, 542 US at 301 (making an exception for fact of a prior conviction; quoting *Apprendi v. New Jersey*, 530 US 466, 490, 120 SCt 2348 (2000)). Mr. McCuller was also charged as a 2nd habitual offender, based on his prior criminal convictions. *See id.* Taking into account these increases in his guidelines based on prior criminal convictions and the facts found by the jury, Mr. McCuller's guidelines were 0 to 11 months. *See* MCL 777.65. Based on this guideline range, Mr. McCuller was entitled by statute to an intermediate sanction, with a maximum sentence of a fixed jail term. See 769.34(4).

At the sentencing hearing, the trial judge found three additional facts: first, that "the victim was touched by any other type of weapon" (Offense Variable 1); second, that "the offender possessed or used any other potentially lethal weapon" (Offense Variable 2); and, third, that "life threatening or permanent incapacitating injury occurred to a victim" (Offense Variable 3).[2] These facts were found using a standard less than beyond

[2] It is irrelevant to the Sixth Amendment question whether or not these facts were presented to the jury. The key question is whether the sentence received by the defendant was based upon the facts *found* by the jury. *See Blakely*, 542 US at 303. That the jury heard testimony supporting these facts only suggests the ease of complying with the requirements of the Sixth Amendment. If the jury had been permitted to make

a reasonable doubt. *Cf. People v. Ratkov*, 201 Mich App 123, 125-26, 505 NW2d 886 (1993) (stating preponderance standard under judicial guidelines). Based on these additional facts, and the corresponding offense variable points, the court increased Mr. McCuller's guideline range to 5 to 28 months. The court imposed a sentence of 2 to 15 years. *See* Sentencing Transcript (No. 02-183-044, 6/17/2003).

Judicial fact-finding that increases a statutory sentence from an intermediate sanction to a prison term is a clear Sixth Amendment violation. These facts not only increase the minimum sentence that a defendant will receive, but also the maximum sentence. The intermediate sanction maximum is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 US at 300. In McCuller's case, these judge-found facts raise the statutory maximum from 11 months to the absolute maximum sentence dictated for the offense of conviction -- 15 years. At least one member of this Court has recognized that "by departing and imposing a prison sentence, the trial court has imposed a maximum sentence beyond that which would have been imposed if the defendant had received an intermediate sanction." *People v. Cupp*, 468 Mich. 931, 663 NW2d 474 (2003) (Markman, J., dissenting from denial of leave to appeal).

The increase from an intermediate sanction, based on judge-found facts, is identical to those departures under the federal guidelines and the Washington state guidelines found to violate the constitution. These findings of fact "increase[] the penalty for a crime beyond the prescribed statutory maximum" and, therefore, "must be submitted to a jury, and proven beyond a reasonable doubt." *See Blakely*, 542 US at 301. Instead, these

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a determination on these facts, and found these facts beyond a reasonable doubt, the sentence given to Mr. McCuller would be constitutionally permissible.

facts were found by the trial court, who imposed a higher statutory sentence on the defendant. "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." *Blakely*, 542 US at 304 (internal citations omitted). This imposition of punishment in violation of the Sixth Amendment is exactly what occurs when a Michigan offender is entitled to an intermediate sanction sentence based on the jury's finding, but instead receives a prison sentence based on judge-found facts.

B. OTHER STATUTORY SENTENCING PROVISIONS DO NOT ALTER APPLICATION OF BLAKELY TO INTERMEDIATE SANCTIONS

The application of *Blakely* to intermediate sanctions requires looking at the specific statutory provisions involved and determining whether the court, in the case at hand, found facts that increased the sentence that the defendant was entitle to by statute.[3] Other Michigan statutes, which also help determine the sentence that a defendant receives, do not eliminate the unconstitutional fact-finding in this case. Specifically, nothing in MCL 769.8 or the *Tanner* rule, MCL 769.34(2)(b), eliminate the application of *Blakely* to intermediate sanctions.

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[3] The reference to other state guideline provisions may be helpful, but requires an examination of how these alternative sentencing systems function, not a rote recitation of case citations. For example, the Hawaii courts, whose *State v. Rivera*, 102 P3d 1044 (2004), opinion is cited approvingly by the People, distinguish between facts extrinsic to the offense of conviction – which can be found by a court – and facts intrinsic to the offense of conviction – which the jury must find. However, the Ninth Circuit recently rejected this extrinsic/intrinsic distinction, upholding a grant of habeas corpus under *Apprendi* for a defendant who so-called "extrinsic facts" were found by a judge. *See Kaua v. Frank*, __F.3d __, (No. 05-15059) (9th Cir. 1/11/06). Further, even if this distinction is permissible under *Apprendi* and *Blakely*, the facts in McCuller's case are undoubtedly intrinsic to the offense.

Of course, a number of states have found that their sentencing guidelines violate *Blakely*. *See, e.g., State v. (James A.) Allen*, 706 NW2d 40 (Minn. Nov. 23, 2005) (unconstitutional for court to find that defendant not amenable to probation and depart from presumptively stayed sentence); *State v. Provost*, __A2d __ (No. 2004-160) (Vt. Dec. 23, 2005); *State v. Natale*, 878 A2d 724 (N.J. 2005); *State v. (Levar Jamel) Allen*, 615 SE2d 256 (N.C. 2005); *Lopez v. Colorado*, 113 P3d 713 (Colo. 2005) (en banc). The task for this Court is to examine whether the intermediate sanction provision, as functionally applied, violates *Blakely*.

MCL 769.8 prohibits the imposition of a determinate sentence, "except as otherwise provided by" the sentencing chapter of the Michigan code. The chapter further provides, in MCL 769.34(4), for intermediate sanctions; where probation, determinate jail sentence or other punishment is appropriate. MCL 769.31(b). Rather than suggesting that the Michigan legislature desired for all sentences to be indeterminate, as defined by Michigan law, MCL 769.8 states that fixed or determinate sentences are provided for in specific sections of the sentencing chapter. Intermediate sanctions are a clear example of this. "By expressly providing for 'intermediate sanctions' in a subcategory of cases with a relative lack of severity, our Legislature plainly created an exception to MCL 769.8." *People v Martin*, 257 Mich App 457, 461; 668 NW2d 397 (2003).

The Prosecuting Attorneys Association of Michigan (PAAM) has suggested, in its amicus in *Drohan*, that the statutory codification of the *Tanner* rule, see MCL 769.34(2)(b), might somehow eliminate the application of *Blakely* and *Booker* to the Michigan sentencing guidelines. This additional statutory constraint on minimum sentences does nothing to change the application of *Blakely* to, in this case, intermediate sanctions. The *Tanner* statute sets a standard cap on the minimum sentence; it can be no more than 2/3 of the absolute statutory maximum. MCL Sec. 769.34(2)(b). PAAM's argument echoes the state of Washington's futile argument in *Blakely* that the presence of a statutory maximum of 10 years meant that the defendant did not have a Sixth Amendment right to jury fact-finding that would increase his statutory sentence, as long as it was under the absolute 10 year cap. *Blakely*, 542 US at 303. The *Blakely* Court clearly determined that this was not the case. *See id.* Likewise, the *Tanner* rule does nothing to cure any *Blakely* violation.

II. BLAKELY REQUIRES JURY DETERMINATION OF FACTS THAT INCREASE A DEFENDANT'S STATUTORY SENTENCE FROM AN INTERMEDIATE SANCTION TO A PRISON SENTENCE

A. MOST APPLICATIONS OF INTERMEDIATE SANCTIONS ARE CONSTITUTIONAL

The mere provision of mandatory intermediate sanctions in the legislative guidelines is not unconstitutional. The legislature can, and did, explicitly provide for non-prison sentences for some offenses and offenders. These intermediate sanction cells represent a legislative policy directive in favor of local confinement or supervisory release for less serious offenders and an effort to minimize the extraordinary costs of incarcerating offenders in state prison. The determination to provide for consistent, proportionate sentences through the use of intermediate sanction is clearly within the purview of the state legislature, and is not in conflict with *Blakely*. *See Blakely*, 542 US 296, 308 (2004).

The intermediate sanction cells can be applied, in many circumstances, consistent with the Sixth Amendment right to a jury trial. First, facts regarding a defendant's prior criminal conviction are explicitly excluded from *Blakely*'s holding. *Id.* at 301. Second, a defendant's admission to offense variable facts would not violate the Sixth Amendment. *Id.* at 303; 310. These admissions could be negotiated as part of a plea agreement on the underlying offense, or could be offered after a trial. Third, a defendant could waive his right to a jury on the relevant facts, and have a judge determine these facts, albeit using a beyond a reasonable doubt standard. *Id.* at 310. In Michigan, about 80 percent of felony cases are resolved through plea bargaining. *See* Michigan Supreme Court Annual Report 2004, at 32 ("In 2004, 79.9 percent of dispositions were guilty pleas. Less than 5 percent of felonies were disposed of by a jury or bench verdict."). In many, if not most, of these

cases, the relevant facts would likely be admitted by the defendant, or the defendant would waive his Sixth Amendment right and allow the court to make these factual determinations. Finally, nothing in *Blakely* limits the sentencing court's discretion to find facts that increase or decrease a defendant's sentence *within* the given statutory range. A court might find facts about the offense that would persuade the court that a longer jail term – within the guidelines supported by the jury's verdict -- is more appropriate than a shorter jail term or probation. For example, in McCuller's case, his original guidelines, based on prior convictions and the jury determinations of fact, were zero to 11 months. The later guidelines, after the judicial findings of fact on three offense variables, were 5 to 28 months. *See* Sentencing Transcript (6/17/03) at 5. A jail sentence between 5 and 11 months would not only take into account the additional alleged facts about the offense, but also adhere to the statutory maximum set by the jury's findings of fact. In this example, the court would be exercising its traditional, and constitutional, authority to sentence within the legislatively determined range.

In sum, many, if not most, of the applications of intermediate sanctions are consistent with requirements of the Sixth Amendment.

B. JURY FACT-FINDING IS REQUIRED IN CASES, SUCH AS MCCULLER'S, WHERE FINDINGS OF FACT INCREASE THE STATUTORY MAXIMUM FROM A MANDATORY INTERMEDIATE SANCTION TO A PRISON SENTENCE

In cases like this one, any fact, other than a prior conviction, that increases the statutory intermediate sanction sentence that a defendant is entitled to, must be submitted to a jury and proven beyond a reasonable doubt. *See Blakely*, 542 US at 301. This is mandated by the Sixth Amendment and consistent with the intent of the Michigan legislature.

The Sixth Amendment demands that a jury make factual determinations that define the offender's wrongdoing and subject the offender to increased punishment. *See Booker*, 125 SCt 738, 749 (2004). This requirement fulfills the common law understanding of the right to a jury trial, *see, e.g., Apprendi v. Washington*, 530 US 466, 510-12 (Thomas, J., concurring), and gives meaning to the right under modern sentencing systems, such as Michigan's legislative guidelines. *See Booker*, 125 SCt at 752.

Requiring jury determination of facts that increase the statutory maximum intermediate sanction sentence is consistent with Michigan legislature's goals of providing a mandatory, comprehensive guideline system that takes into account the scarce resources of the Department of Corrections.

Intermediate sanctions have been an integral part of the Michigan legislative guidelines since their inception. Michigan Public Act 445 of 1994, which established the sentencing commission and the framework for the legislative guidelines, required that the guidelines "specify the circumstances under which a term of imprisonment is proper and the circumstances under which intermediate sanctions are proper." *See* 1994 Mich. P.A. 445, Sec.33(1)(e)(v). This is one of seven objectives of the sentencing guidelines that were to be developed. *See* 1994 Mich. P.A. 445, Sec 33(1)(e). The Act further provided that "[t]he sentencing guidelines *shall* include recommended intermediate sanctions for each case in which the upper limit of the recommended minimum is 18 months or less." *See id.* at (3)(emphasis added). The importance the legislature ascribed to intermediate sanctions, as part of the entire sentencing guidelines scheme, is undeniable. One of the "evident purposes" of the legislative sentencing guidelines is the "encouragement of the use of sanctions other than incarceration in the state prison." *See People v. Garza*, 469

Mich. 431, 434-35; 670 NW2d 662 (2003). This is accomplished through mandatory intermediate sanctions for some defendants, who are punished in ways that conserve the use of limited prison space for more serious offenders and offenses. *See* Hon. Paul L. Maloney, *The Michigan Sentencing Guidelines*, 16 T.M. Cooley L. Rev. 13, 19 (1999) (Judge Maloney served as the Chairman of the Sentencing Commission).

Intermediate sanctions are a central fixture of the guidelines. Intermediate sanctions are available for every Class of guideline offense except Class A, determined by the legislature to be the most serious offenses. Every other Class (B-H) in the guidelines has an intermediate sanctions portion, under which offenders can receive a jail or other non-prison sentence. The proportion of convicted offenders eligible for intermediate sanctions increases as the severity of the offense, as determined by the legislature, decreases. For example, for Class H felonies, intermediate sanctions are deemed an appropriate sentence for all offenders. These intermediate sanction cells represent a significant portion of the guideline cells. In other words, the guidelines reflect the legislature's intent to provide intermediate sanctions for some offenders in appropriate circumstances.

Jury fact-finding would help fulfill this intent by promoting mandatory, cost-saving, intermediate sanction sentences in some circumstances, allowing more serious offenders to be sent to prison, and upholding the legislature's determination about the appropriate division. *See Blakely*, 542 US at 308. Further, requiring jury findings of fact, in situations such as this one, where a factual finding will increase the statutory maximum sentence from an intermediate sanction to a prison sentence, ensures that the sentence imposed comports with the requirements of the Sixth Amendment.

CONCLUSION AND RELIEF REQUESTED

The United States Supreme Court held in *Blakely v. Washington*, 542 US 296, 124 S Ct 2531 (2004) that unless a fact has been admitted by a defendant, that fact cannot be used to increase a defendant's sentence beyond the statutory maximum unless it has been submitted to a jury and proven beyond a reasonable doubt. The judicial finding of facts in this case increase McCuller's statutory sentence and, as a result, violate the Sixth Amendment.

Accordingly, CDAM, as amicus curiae, urges this Court to grant leave in this case, or in the alternative, to remand Mr. McCuller's case for resentencing consistent with the Sixth Amendment's requirements.

Respectfully submitted,

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